No. 79-1610

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

RAMONA A. DROBENA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEEL WORKERS OF AMERICA,
AFL-CIO, CLC, LOCAL 6178

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 612 F. 2d 1095. The decision and order of the National Labor Relations Board (Pet. App. 9a-16a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1980. The petition for a writ of certiorari was filed on April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board exceeded its remedial authority in approving a settlement agreement which did not contain, as a remedy for the Union's unlawful action in physically coercing employees who went to work during a strike, a provision compensating the employees for lost pay for work that they missed as a result of the Union's action.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 17a-18a.

STATEMENT

1. In the Spring of 1978, petitioners, five employees of National Rejectors, Inc., filed charges with the National Labor Relations Board alleging that the United Steel Workers of America, AFL-CIO, CLC, Local 6178, the exclusive bargaining representative for the employees at National Rejectors, had violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by interfering with petitioners' rights to "(a) refrain from union membership [and] (b) refrain from engaging in concerted strike activities" (A. 4-6).[1] The Board's Regional Director subsequently issued a complaint alleging that the Union had violated Section 8(b)(1)(A) by reason of three of its officers and several of its members having made threats of violence and having engaged in acts of violence directed against some of the petitioners in retaliation for their having crossed the Union's picket line during a strike against National Rejectors (A. 8-11). In September 1978, the Regional Director entered into a stipulation in settlement of the case, in which the Union

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[1]References to "A." are to the printed appendix filed in the court of appeals.

agreed to cease and desist from the conduct alleged and to post appropriate notices, and consented to the entry of a Board order to that effect and to judicial enforcement of the order (A. 12-18).

Petitioners objected to the proposed settlement only to the extent that it "omit[ted] backpay relief" (A. 20). Their objection was rejected by both the Regional Director and the General Counsel (A. 18-19, 20-31, 32-36). The General Counsel then submitted the settlement agreement to the Board for approval, noting that "it is well settled that Board precedent precludes [a backpay] remedy" (A. 18).

2. The Board approved the settlement over petitioner's objection. In so doing, the Board reaffirmed the policy considerations set forth in *Catalytic Industrial Maintenance Co.*, 219 N.L.R.B. 414 (1975), *Lock Joint Pipe & Co.*, 202 N.L.R.B. 399 (1973), and *Long Construction Co.*, 145 N.L.R.B. 554 (1963), in which the Board had declined to award backpay remedies in situations similar to the instant case (Pet. App. 10a-11a n.1).[2]

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[2]As the Board explained in *Lock Joint Pipe & Co., supra*, 202 N.L.R.B. at 399-400 (footnotes omitted):

> The extension of backpay liability to a situation where, as here, only picket line misconduct has occurred involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act. Those sections of the Act have been called the safety valves of labor management relations. Emotions run high among those for and those against the union. Regrettable [*sic*], sometimes there is violence and the threat of violence. This we deplore and in no way condone. However, adequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interfering with the right to strike. Where union agents, including pickets, engage in conduct violative of Section 8(b)(1)(A), the Board enjoins the continuation of such conduct and may, if warranted, seek an immediate court injunction under Section 10(j) of the Act. If

3. Petitioners sought review in the court of appeals. The court enforced the Board's order (Pet. App. 1a-7a), observing that the parties agreed "that the Board has wide discretion in approving amicable settlements * * * and that settlements approved by the Board need not necessarily satisfy all the demands of every 'charging party' [and, further,] that the making or withholding of [backpay] awards rests within the sound discretion of the Board, subject to limited judicial review" (Pet. App. 5a). The court of appeals concluded "it is not the function of

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such judicially directed injunctive relief is ignored, effective contempt action is available. Finally, when a union resorts to or encourages the use of violent tactics to enforce its representation rights the Board may decline to issue a bargaining order to remedy an employer's unfair labor practices and instead may direct an election to determine whether or not the union is the recognized representative.

To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an extent as to substantially diminish that right. For the misconduct of a few pickets may be sufficient to find the union in violation of Section 8(b)(1)(A) and enough to intimidate many employees. The Board would then be required * * * to seek backpay for all intimidated employees. Faced with this financial responsibility, few unions would be in a position to establish a picket line.

Cf. International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42, 48-52 (1979).

In *Long Construction Co., supra*, the Board added that the lack of a Board order awarding backpay to employees unable to work because of injuries resulting from a union's unlawful conduct will not leave such employees without redress against those responsible for their injuries. Such individuals will still have available those private remedies traditionally used to process claims resulting from another's tortious conduct. See *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958). In fact, they may be better served by pursuing such remedies, since an employee's pay may be only a small part of the total amount required to make him whole, which may include medical expenses and compensation for physical injury and for pain and suffering (*id.* at 645-646).

the court to make Board policy. The policy in question is one of long standing, and we decline to disturb it. Nor, granting the validity of the policy, do we see any abuse of agency discretion in the application of the policy to this case" (Pet. App. 7a).

ARGUMENT

Section 10(c) of the Act, 29 U.S.C. 160(c), endows the Board with broad discretion to establish appropriate remedies. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). A remedial order "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), quoting *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943), for "[t]he particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' " *Virginia Electric & Power Co.* v. *NLRB*, *supra*, 319 U.S. at 539, quoting *I.A. of M.* v. *NLRB*, 311 U.S. 72, 82 (1940); *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 600 (1941). This broad discretion extends to "[t]he remedy of back pay [, which] is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941).

Similarly, the Board has broad discretion to approve settlements despite the objections of a concerned party. Settlements enable the Board to put a quick end to misconduct by subjecting violators to civil and criminal contempt penalties and to avoid protracted and often unpredictable litigation. Moreover, settlements, like remedial orders entered after litigated proceedings, are designed to effectuate public, not private, interests. The Act creates no private rights, but rather authorizes the

Board to impose remedies in the public interest to effectuate the purposes of the Act. See *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261, 269-270 (1940); *NLRB* v. *Martin A. Gleason, Inc.*, 534 F. 2d 466, 482-483 (2d Cir. 1976); *Oshkosh Truck Corp.* v. *NLRB*, 530 F. 2d 744, 748 (7th Cir. 1976), and cases cited therein.

The court below correctly concluded that, under the foregoing principles, it was an allowable exercise of the Board's authority under the Act to accept a settlement which did not compenate the employees for lost pay for work that they missed as a result of the Union's strike misconduct. The court's decision is in accord with those of other courts of appeals that have considered the question. See *NLRB* v. *Martin A. Gleason, Inc., supra; NLRB* v. *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO*, 476 F. 2d 1031, 1037 (1st Cir. 1973).[3] Moreover, the Board's policy of not awarding backpay to employees who are absent from work because of union unfair labor practices that do not cause unlawful employer discrimination has been in effect for more than thirty years and Congress, although it has twice amended the Act during that time, has not seen fit to change that policy. See *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). In these circumstances, no issue warranting review by this Court is presented.[4]

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[3]In *Progressive Mine Workers* v. *NLRB*, 187 F. 2d 298, 307 (1951), the Seventh Circuit agreed with the Board's position in *Colonial Hardwood Flooring Co.*, 84 N.L.R.B. 563 (1949), that it lacked statutory authority under Section 10(c) to grant backpay in the situation here. Presently, the Board bases its policy not on any statutory prohibition, but rather on policy considerations (see cases cited at page 3, *supra*).

[4]Petitioners' reliance (Pet. 7-8) on *Graves Trucking, Inc.*, 246 N.L.R.B. No. 52 (Nov. 2, 1979), is misplaced. In that case, the Board

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ordered the employer to pay lost wages to an employee who was incapacitated from working as a result of a physical attack by his supervisor precipitated by the employee's challenge, on behalf of himself and his fellow employees, to a change in working conditions. However, as petitioners recognize (Pet. 7 n.2), an award of backpay in that case was not likely to chill the fundamental right to strike. By contrast, a backpay award in the situation here would present that danger (see note 2, *supra*). Nor can the instant case be viewed as involving only post-strike retribution directed at non-participating employees. The incidents of violence began during the strike and spilled over into the immediate post-strike period (see Pet. App. 2a n.2).

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